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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

No. 924

LEVISA STONE CORPORATION, and JOHNSON BROTHERS LIMESTONE COMPANY, - - - - - - - Petitioners,

versus

ELKHORN STONE COMPANY, INC., - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, TO UNITED STATES COURT OF APPEALS, FOR SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

ELKHORN STONE COMPANY, INC., - *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, TO UNITED STATES COURT OF APPEALS, FOR SIXTH CIRCUIT.

The respondent, Elkhorn Stone Company, Inc., prays that the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Judicial Circuit filed by petitioners be denied.

COUNTERSTATEMENT OF QUESTION PRESENTED.

Did the United States Court of Appeals for the Sixth Circuit err in holding that since the district court did not find excusable neglect within the meaning of FRCP 73 (a) (2), its order extending the time for filing notice of appeal was ineffective to give jurisdiction to the appellate court.

STATUTES AND RULES INVOLVED.

The petitioners, in their petition for writ of certiorari, in compliance with Rule 40 of the Supreme Court, have set forth on pages 2 and 3 of their petition the statutes and rules involved in this case. Petitioners assert the applicability of FRAP 4 which became effective July 1, 1968. The respondent denies that Rule 4 of the Federal Rules of Appellate Procedure is applicable in this case. The United States Court of Appeals for the Sixth Circuit, in sustaining a motion to dismiss the appeal because of lack of its jurisdiction, was compelled to and did construe FRCP 73 (a) (2). That rule regulating the filing of late notices of appeal was the governing rule in May of 1968, the Federal Rules of Appellate Procedure not becoming effective until July 1, 1968. Indeed, it should be pointed out that the petitioners styled their motion for leave to file their notice of appeal in the District Court as: "Motion for Leave to File Notice of Appeal Pursuant to Rule 73 (a) (2)" (JA, Vol. 1, pp. 42-43).

STATEMENT OF THE CASE.

The United States Court of Appeals for the Sixth Circuit dismissed the petitioners' appeal from a judgment of the United States District Court for the Eastern District of Kentucky on the sole ground that it did not have jurisdiction of the appeal because of the petitioners failure to file a timely notice of appeal. The specific basis of the holding was that the petitioners had not shown "excusable neglect" within the mean-

ing of FRCP 73 (a) (2) as that rule existed at the time of the entry of the judgment in the United States District Court. The United States Court of Appeals for the Sixth Circuit expressly did not reach the merits of this controversy, its opinion concluding that the appeal must be dismissed because it had no jurisdiction to hear the appeal (Opinion, Appendix A, Petitioners' Petition for Writ of Certiorari).

In this state of the record, the respondent respectfully submits that the merits of the initial controversy are not before this Court for review and that the single question presented is whether the United States Court of Appeals for the Sixth Circuit committed error in its construction of FRCP 73 (a) (2) as that rule existed at the time of the entry of the judgment in the trial court, and at the time the belated notice of appeal was attempted to be filed. The respondent rejects the petitioners' statement of facts on the merits as being irrelevant to the procedural question on which the petition turns.

The relevant facts here are that on March 14, 1968, the United States District Court for the Eastern District of Kentucky entered a final order dismissing petitioners' complaint (JA, Vol. 1, p. 42).

On May 13, 1968, the sixtieth day after the entry of the final judgment, the petitioners filed their "Motion for Leave to File Notice of Appeal Pursuant to Rule 73 (a) (2)." This motion was not filed pursuant to the provisions of Rule 4 of the Federal Rules of Appellate Procedure, those rules not becoming effec-

tive until July 1, 1968, more than one month after the filing of such motion on May 13, 1968.

A Notice of Appeal was tendered simultaneously with the filing of this motion (JA, Vol. 1, pp. 42-43).

The motion of the petitioners for extension of time, filed on the sixtieth post-judgment day, reads:

> "Plaintiffs herein move that the Court extend for 30 days the period in which to file a notice of appeal pursuant to the provisions of Rule 73 (a) (2), to and including May 13, 1968.
>
> "As grounds for said motion, plaintiffs assert that on May 6, 1968 in a companion case to the instant case, entitled Levisa Stone Corporation, et al. vs. Alexander B. Trowbridge, et al., being No. 1147 on the docket of this Court, this Court denied the Government's motion to dismiss the complaint therein.
>
> "The action of the Court in No. 1147 will require a trial upon the merits of the matter. The resolution of that case on the merits will necessarily involve the rights of the parties in No. 1148.
>
> "On appeal, plaintiffs will contend that the District Court erred in dismissing the complaint against the private parties in No. 1148. *The implication and the import of this Court's decision dismissing the complaint in No. 1148 became clear only upon receipt of the decision of the District Court in No. 1147.*
>
> "Moreover, it is possible that the Government will ask for leave to file an interlocutory appeal to the order of the District Court in No. 1147. Thus, if such leave is granted, a portion of the issue will be raised before the Court of Appeals.

In these circumstances plaintiffs assert that it is proper that the full scope of the issues raised by plaintiffs' complaints be presented to the Court of Appeals.

"For the foregoing reasons plaintiffs move that the e x t e n s i o n heretofore requested be granted." (Our emphasis.)

This action was pending on the docket of the United States District Court for the Eastern District of Kentucky, Pikeville Division. Pikeville, Kentucky is located approximately 135 miles southeast of Lexington, Kentucky, the central location of that District Court. On May 20, the respondent filed its objection to the motion of the petitioners for leave to file a notice of appeal out of time, but before the file could be forwarded to the District Court Judge for consideration, and without any hearing being accorded to the respondent, the trial court signed an order sustaining the motion for leave to file the notice of appeal and directed that the tendered notice be filed as of May 13, 1968. This order did not make any finding of neglect, excusable or otherwise (JA, Vol. 1, p. 44).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The first question stated as being presented by this petition is whether an injured competitor has standing to challenge alleged illegal act of the government giving financial assistance to a private party.

It is respectfully submitted that this question is not before the Court on this petition. The Supreme Court of the United States does not sit as a court of original jurisdiction. In controversies such as this, this Court merely reviews decisions at the trial and intermediate appellate level. By no stretch of the imagination can this petition for a writ of certiorari serve to permit this Court to try a dispute on its merits.

Nor does this case involve any question of erroneous interpretation of new Rule 4 of the Federal Rules of Appellate Procedure simply because the right to file the notice of appeal out of time in the District Court was governed by the provisions of FRCP 73 (a) (2) governing appellate review at the time the motion was filed.

Prior to 1966, FRCP 73 (a) provided in its pertinent part:

> "The time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from * * * except upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the District Court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

By amendment effective July 1, 1966, FRCP 73 (a) was amended in its relevant part to read as follows:

> "An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed

> from, except that: (1) in any action in which the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed;"

It is the unanimous rule that compliance with the rules regulating appeals is mandatory and jurisdictional and that a failure to comply with such rule divests the Court of Appeals of its jurisdiction with the resulting loss to the right of appeal. *Deena Products Co.* v. *United Brick & Clay Workers of America, et al.,* 195 F. 2d 612 (6th CA); *Schlink* v. *Chesapeake & Ohio Railroad Company,* 276 F. 2d 116 (6th CA); *Richland Knox Mutual Insurance Co.* v. *Kallen,* 376 F. 2d 360 (6th CA).

Even under FRCP 73 (a), as it existed prior to July 1, 1966, an ex parte order extending the time for filing a notice of appeal, without notice to the opposing party, was void. *Cohen* v. *Plateau Natural Gas Co., et al.,* 303 F. 2d 273 (10th CA); *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.,* 193 F. 2d 951 (9th CA).

In *Winchell* v. *Lortscher,* 377 F. 2d 247, at page 251, the Eighth Circuit Court of Appeals said:

> "A motion for extension of time to appeal may be made in the District Court either before or after the expiration of the original 30 days. Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,

1962, 371 U. S. 215, 216-217, 83 S. Ct. 283, 9 L. Ed. 2d 261. But after the expiration of the original 30 days the District Court may not grant ex parte an extension of time for appeal but must give notice and opportunity to be heard to all adverse parties. Cohen v. Plateau Natural Gas Co., 10 Cir., 1962, 303 F. 2d 273, 274, certiorari denied, 371 U. S. 825, 83 S. Ct. 45, 9 L. Ed. 2d 64; North Umberland Mining Co. v. Standard Acc. Ins. Co., 9 Cir., 1952, 193 F. 2d 951, 952. In the above cited cases the Courts of appeals found themselves unable to take jurisdiction either because the notice of appeal was filed beyond the absolute 60-day limitation or the extension of time within which to take an appeal was improperly granted by the trial court after the expiration of the original 30-day period in an ex parte proceeding. Neither of these situations is present in the instant case for the motion for an extension of time and the notice of appeal were filed on the sixtieth day after the entry of an appealable order and the motion for an extension of time was granted after an adversary hearing, although there may be some question here as to whether appellee personally received notice of this twelfth hour proceeding. Therefore this case, unlike those previously cited, squarely presents the problem of whether there was, as a matter of law, any grounds for granting an extension of time for an appeal beyond the original 30 days after the entry of the appealable order, as provided for in Rule 73 (a)."

The order of the district court extending the time, entered on May 22, 1968, was entered at Lexington, Kentucky without the record in this case being before

him, and without the trial court being advised of the respondent's objections. Moreover, it was entered without the opportunity being given respondent to be heard on its objections.

It will be noted that the order permitting the filing of the notice of appeal as of May 13, 1968, did not recite any finding of neglect, excusable or otherwise, or any reason at all why the extension of time was granted.

Prior to July 1, 1966, the only excusable neglect authorizing the district court to extend the time for the filing of a notice of appeal was a failure of a party to learn of the entry of judgment. At the time here pertinent, FRCP 73 (a) (2) authorized an extension of time upon a showing of "excusable neglect."

That power, however, could only be exercised upon the meeting of the standards set forth. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 303 F. 2d 609, vacated 83 S. Ct. 283, 371 U. S. 215, 9 L. Ed. 261, on remand 313 F. 2d 864; *Winchell* v. *Lortscher, supra.*

Good cause for an extension of time must be shown. *U. S.* v. *Bowen,* 306 F. 2d 620 (5th CA).

The only pronouncement by a United States Court of Appeals construing FRCP 73 (a) (2) is that of *Winchell* v. ***Lortscher, supra.***

There the Eighth Circuit quoted from the Advisory Committee's comments upon the effect of the change in the rule.

> " 'The original rule authorized the district court to extend the time for appeal for a period not to exceed 30 days from the expiration of the

time otherwise prescribed "upon a showing of excusable neglect based upon a failure of a party to learn of the entry of the judgment * * *." The exception numbered (2) eliminates the phrase "based upon a failure of a party to learn of the entry of the judgment" and thus empowers the district court to extend the time upon a showing of excusable neglect of any kind. In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result.'"

The Court then said:

"The word change was therefore not intended to fundamentally alter the scope of the rule. Judicially, it has long been recognized that in light of Rule 73 (a) the only valid ground for extension of appeal time is a showing of excusable neglect based upon the failure of a party to learn of an entry of judgment. Se, e. g., Knowles v. United States, 5 Cir., 1958, 260 F. 2d 852, 854; Howard v. Local 74, Wood, Wire and Metal Lathers International, 7 Cir., 1953, 208 F. 2d 930, 932; Felton v. Florida East Coast Ry. Co., D. C. S. D. N. Y. 1948, 8 F. R. D. 232, 233. In light of the Advisory Committee's comments upon the Rule 73 (a) changes and the interpretative judicial decisions, it is clear that it remains incumbent upon appellant to show that he comes precisely within the scope of Rule 73 (a) which still requires a showing of excusable

> neglect based upon the failure of a *party* to timely learn of an entry of judgment before any extension of time to make an appeal beyond the original 30-day period is permitted."

The motion for leave here under consideration does not purport to state any neglect, excusable or otherwise. It is asserted that in a "companion case" a certain order was entered on May 6, 1968. On March 14, 1968, the trial court sustained a motion to dismiss and entered a final judgment dismissing the complaint. The petitioners and their counsel knew the implication and import of that order on the day it was entered as fully as they did on the sixtieth post-judgment day. The entry of an order overruling a motion to dismiss in another case added nothing to their knowledge with respect to the implication and import of the final order dismissing the complaint in this case.

If plaintiffs-appellants' counsel committed error in his construction and effect to be given the judgment dismissing the complaint in the case at bar, it was not excusable neglect. To hold otherwise would be to say that after counsel makes a reasoned judgment in the conduct of a trial, he can thereafter urge that he was in error and that his neglect excuses his client from the consequences of that error.

We respectfully submit that a mistaken opinion of counsel, made with full knowledge of all the facts, cannot be transmuted into "excusable neglect" as that term is used in FRCP 73 (a) (2).

RELIEF REQUESTED.

The respondent respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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